FOR ARGUMENT

No. 89-453

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In the

Supreme Court of the United States

October Term, 1989

METRO BROADCASTING, INC.,

Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION, Et Al.,

Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICUS CURIAE* OF GILES TELEVISION, INC. IN SUPPORT OF RESPONDENTS

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BRIEF *AMICUS CURIAE* OF GILES TELEVISION, INC. IN SUPPORT OF RESPONDENTS

Giles Television, Inc., by and through the undersigned counsel and with the written consent of the parties, respectfully submits this brief as *Amicus Curiae* in support of the Respondents. The letters of consent from the parties to this case have been filed concurrently with this Brief.

INTEREST OF *AMICUS CURIAE*

This case arises from a Fifth Amendment equal protection challenge to a federal statute that requires the Federal Communications Commission ("the FCC") to continue to use certain procedures in licensing radio and television stations. These procedures, in addition to other public interest purposes, are designed to overcome the barriers that, in the past, have prevented certain minority groups from entry into

broadcasting. The procedures allow minority status to be given substantial weight in evaluating the factors that are used in determining who should be granted a radio or television license in a comparative hearing. Minority status is not the only factor considered in these hearings. It is, though, one of the many factors considered to determine the best qualified applicant to hold the license in the public interest.

Giles Television, Inc. ("Giles Television") is an applicant for a television station license to be issued by the FCC. The application was designated for comparative hearing on April 27, 1988 and the hearing is now in progress. Giles Television is owned by an individual who qualifies as a minority under the current FCC comparative hearing procedures. The owner, who is an African American, is directly affected by the resolution of the constitutional issues presented in this case, as are all other minority entrepreneurs who have entered the field of broadcasting in response to the inducements to such ownership developed by the FCC and mandated by Congress.

SUMMARY OF ARGUMENT

Fifth Amendment review of a federal statute imposing a racial or ethnic classification should adhere to the standard of review established in *Fullilove v. Klutznick*, 448 U.S. 448 (1980). The statute must first be examined to determine whether the objectives of the classification are within the powers of Congress. This part of the review process includes an examination to determine whether the public purpose of the classification is *legitimate, i.e.*, substantial and supported by appropriate findings that there is a clear public need for the measures that Congress has adopted. The classification is then reviewed under the equal protection component of the Fifth Amendment to determine whether it is "narrowly tailored" to its objectives. This approach to a Fifth Amendment equal protection challenge is different in focus from the "strict scrutiny" standard of review applicable under the Fourteenth Amendment to state imposed racial and ethnic classifications. A different standard of review is required because the intent underlying the Fifth Amendment, and the

level of government that it affects, is fundamentally different from the Equal Protection Clause of the Fourteenth Amendment.

The statute under review in this case implements clearly legitimate and substantial national economic and remedial policies under the Commerce Clause, as well as diversity of opinion and viewpoint goals under the First Amendment. Those economic policies are to remove discriminatory barriers to minority entry into broadcast station ownership. In enacting the statute, Congress expressly referenced its earlier policy to remedy the lack of minority ownership in broadcasting, which it found to have stemmed from private racial and ethnic discrimination. These congressional findings are entitled to great weight, and are supported by ample evidence that such discriminatory barriers to commerce exist. Congress can, under the Commerce Clause, impose a "narrowly tailored" racial or ethnic classification system to remove these barriers, as can the FCC under the powers delegated to it in the Communications Act of 1934, as amended.

The classification imposed by the statute under review is "narrowly tailored" to its objectives. It does not impose a quota, nor create a situation where race or ethnicity is outcome determinative in the comparative hearing process. The classification is not over inclusive. Race or ethnicity is considered in the comparative hearing process only to the extent that minority ownership is integrated into the management of the station and thus more responsive to the program needs of the community to be served under the license. The classification does not unreasonably affect those who do not obtain its benefits, as their interest in a comparative hearing is an expectancy, not a vested right. Conversely, the classification does not harm minorities by stereotyping them as succeeding by reason of a factor not related to individual worth. Lastly, less intrusive remedies for the lack of minority ownership in broadcasting have been attempted but have not succeeded.

ARGUMENT

The classification mandated by the statute under review is used by the FCC in evaluating the qualifications to hold a radio or television license. Those licenses, which are usually referred to as "broadcast licenses", are granted either through a comparative hearing, 47 U.S.C. Section 309, or by random selection, 47 U.S.C. Section 309(i)(3)(A). Both methods of licensing include administrative procedures that promote diversity of minority broadcast station ownership. Only the procedures in comparative hearings, and the related statutory authority for them, are under review here. Nonetheless, the legislative and regulatory history of the similar minority ownership inducement procedures in random selection broadcast licensing is relevant and material to this case.

In broadcast license comparative hearings, a license applicant who is a member of certain minority groups is given "comparative merit" *vis-a-vis* competing non-minority applicants under certain limited circumstances. *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979, 981-982 (1978). There are two basic comparative factors that are weighed in these hearings, first, the extent of each applicant's other broadcast licenses or media holdings, and, second, the extent to which each applicant proposes to integrate its ownership into the active management of the station. *Statement of Policy on Comparative Broadcast Hearings*, 1 F.C.C.2d 393, 394-395 (1965). The applicant with the least other licenses or holdings is favored under the first factor without any weight given to minority status.

Under the second factor, the applicant who proposes maximum integration into management is favored. Minority status is considered under this factor. *WPIX, Inc.*, 68 F.C.C.2d 381, 411-412 (1978). In such a case, minority status is considered a "substantial integration enhancement" favoring the minority applicant. *Waters Broadcasting Corp.*, 91 F.C.C.2d 1260, 1264 (1982), aff'd *sub nom., West Michigan Broadcasting Co. v FCC*, 735 F.2d 601 (D.C. Cir. 1984), cert. denied, 470 U.S. 1027 (1985). Other integration

enhancements are considered "substantial" and have equal weight with minority status under the integration factor. Other factors of equal weight include local residence in the community to be served under the license and previous ownership of a "daytime only" AM radio station. *Implementation of BC Docket No. 80-90 to Increase the Availability of FM Broadcast Assignments*, 59 R.R.2d 1221, 1222 (1986).

The regulatory purpose of these comparative procedures is not to promote minority ownership of broadcast stations *per se*. As the FCC emphasized in its *Statement of Policy on Comparative Broadcast Hearings, supra* at 394-395, the purpose is to promote "maximum diffusion of control of the media of mass communications" and attain the "best practical service to the public". The first comparative factor aims at diffusion of control by favoring new entrants into the broadcast industry. The second factor aims at better programming by favoring applicants whose ownership is involved in management, and closer to the program needs of the community being served. This factor, as the FCC has said, also fosters diffusion of control in that individuals or entities holding multiple broadcast licenses or other media properties can seldom become involved in the active management of a particular station. *Id.* at 395.

The comparative hearing procedures for considering minority status were adopted in 1978 after the decisions in *TV 9 v. FCC*, 495 F.2d 929 (D.C. Cir. 1973), cert. denied, 419 U.S. 986 (1974), and *Garrett v. FCC*, 513 F.2d 1056 (D.C. Cir. 1975). See *Statement of Policy on Minority Ownership of Broadcasting Facilities, supra* at 982 (1978). Subsequently, after the decision in *Steele v. FCC*, 770 F.2d 1192 (D.C. Cir. 1985), the FCC sought to reconsider these procedures, even though *Steele* concerned only a gender preference in comparative hearings. See *Reexamination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications*, MM Docket 80-484, 1 FCC Rcd 1315 (1986). Congress then intervened by passing the statute under review which, in effect, requires the FCC to continue to treat minority status as a "substantial integration enhancement". *Continuing*

Appropriations Act for the Fiscal Year 1988, Pub.L. No. 100-202, 101 Stat. 1329 (1988). In so doing, Congress also expressly referenced its 1982 legislation which required a similar treatment of minority status in random selection broadcast licensing. *Communication Amendments Act of 1982*, Pub.L. No. 97-259, 96 Stat. 1087 (1982), amending, 47 U.S.C. Section 309(i)(3)(A).

It is the position of this *Amicus Curiae* that Fifth Amendment review of Congress' legislative mandate concerning minority status as a license qualification should center on *the lawfulness of Congress' action and the public policy objectives underlying its action.* The Court is also urged to consider those objectives *in an economic policy context.* Both the statute under review and the 1982 legislation sought to implement fundamental economic and remedial policies under the Commerce Clause. U.S. Const., Art. I, Section 8. Those policies draw their origin from the 1968 Report of the National Advisory Commission on Civil Disorders ("the Kerner Commission"). The Kerner Commission recommended that the government encourage minority participation in the economy. The Kerner Commission, *1968 Report of the National Advisory Commission on Civil Disorders* 424 (Pantheon Ed. 1988). Many government initiatives are derived from that recommendation. See *Executive Order 11458*, 34 Fed.Reg. 4937 (March 5, 1969); *Executive Order 11518*, 35 Fed.Reg. 4939 (March 21, 1970); and *Executive Order 11625*, 36 Fed.Reg. 19,967 (October 13, 1971) directing federal agencies to support minority business enterprise programs.

The Report issued by the Kerner Commission and the severe problems of poverty and economic discrimination that it addressed should not be forgotten, or regarded merely as a matter of history. Deliverance of "equality of economic opportunity", and victory in "the battle against pernicious racial discrimination", is not yet anywhere near achieved. *Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 757 (1989) (Marshall, J., dissenting). The Court is urged to consider minority enhancement programs in the unique economic setting of the broadcast industry, which depends on a finite

public resource to bring its product to the public, a resource which is regulated "in the public interest" by Congress and the FCC under the Commerce Clause. This is a far different situation from the ordinary private enterprise that depends on government for only the exercise of police and other general welfare powers. The Court is also asked to consider the personal and human dimension of the FCC's effort to increase minority broadcast ownership.

The plain fact is that minorities have been, for years, excluded from participating in the economic opportunities of broadcasting, either by reason of private discrimination or the operation of the "system". The FCC's minority enhancement procedures, together with the structured application rules that allow minorities, and other applicants, to overcome financing difficulties, offer the first light of a new day.[1] There is no constitutional or statutory basis to find these procedures invalid. Nonetheless, if they are, considerations of fairness and equity command that the holding be applied prospectively. Minority applicants now in the comparative hearing process have invested time, effort and substantial resources based in large measure on the inducement offered through the minority enhancement procedures in comparative hearings. They would not be in the process today but for this inducement, as history can attest. At a minimum, the hopes and expectations of minorities, if they are to be ended, should at least be limited to future comparative hearings, and not to those which are already in progress.

I. THE APPROPRIATE STANDARD OF REVIEW IN THIS CASE IS THE *FULLILOVE V. KLUTZNICK* APPROACH TO A FIFTH AMENDMENT EQUAL PROTECTION CHALLENGE

The proper constitutional focus for review of the validity of the statute which commands the FCC to continue to

[1] Under the structured application rules individuals or entities that hold only a non-voting equity interest in the station are not considered as owners in determining the extent of integration. Applicants can thus obtain financing through limited partnerships or other commercial arrangements combining financing through "passive" investors and operational control in the owners that hold the voting stock. See *Cotton Broadcasting Co.*, 4 FCC Rcd. 1781, (1989) and *Daytona Broadcasting Co., Inc.*, 103 F.C.C. 2d 931 (1986).

use its minority enhancement procedures in comparative hearings is the Due Process Clause of the Fifth Amendment, U.S. Const., amend. V, and not the Equal Protection Clause of the Fourteenth Amendment, U.S. Const., amend XIV, Section 1. Radio and television licensing is an area of commerce under exclusive federal regulation pursuant to Title III of the Communications Act of 1934, as amended, ("the Communications Act"). *Fisher's Blend Station, Inc. v. Tax Commission*, 297 U.S. 650, 655 (1936), citing, *FRC v. Nelson Bond Mortgage Co.*, 289 U.S. 266, 279 (1933). Unlike the regulation of telephony, 47 U.S.C. Section 152(b), there is no such thing as "intrastate" broadcast service.[2] The Equal Protection Clause of the Fourteenth Amendment is applicable only to governmental action by a state or its instrumentalities. *District of Columbia v. Carter*, 409 U.S. 418, 423 (1973). See also *Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 719 (1989) (O'Connor, J., plurality opinion), citing, *Ex Parte Virginia*, 100 U.S. 339, 345 (1880). The Amendment affects the federal government only in the sense that, under its Section 5, Congress has the power "to enforce" the Amendment through "appropriate legislation". U.S. Const., amend. XIV, Section 5.

The Fifth Amendment contains no equal protection language, although "due process", as a concept, certainly implies impartiality in federal governmental action. This *implied* equal protection component of the Fifth Amendment can in many cases create the same rights of citizenship as are conferred under the *express* mandate of the Fourteenth Amendment. But the two clauses are not co-extensive. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976). Where there are substantial and legitimate national interests involved, Congress can impose racial and ethnic classifica-

[2] In 1982 Congress amended Section 301 of Title III to specify that the regulatory authority delegated under it to the FCC extends to "all channels of radio transmission." 47 U.S.C. Section 301, as amended by, *Communication Amendments Act of 1982*, Pub. L. 97-259, 96 Stat. 1087 (1982). In enacting the amendment, Congress expressly stated that its purpose was to make it clear that broadcasting is, by nature, interstate, citing *Fisher's Blend Station, Inc., 297 U.S. 650*. See *H.R. Conf. Rep.* No. 97-765, 97th Cong., 1st Sess. 31-32 (1982).

tions, particularly for remedial purposes.[1] The principal recent case is *Fullilove v. Klutznick*, 448 U.S. 448 (1980), where the Court upheld a federal statute imposing a racial and ethnic classification applicable to the distribution of public contracting funds. See also *Korematsu v. United States*, 323 U.S. 215 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943).

Racial and ethnic classifications imposed by Congress require "close examination," *Fullilove*, 448 U.S. at 472, but the analysis used in *Fullilove* differs in focus from the "strict scrutiny" applied to state or local governmental classifications. The first step in the review of a racial or ethnic classification imposed by Congress is to determine if the "objectives" of the classification are within Congress' powers. *Fullilove*, 448 U.S. at 473. Subsumed in this test is also the requirement that the purpose of the classification must be legitimate and substantial, which is but another way of saying that the purpose must be real and based on adequate findings of a public purpose need. The emphasis is thus not on whether the public policy is "compelling" but on whether its objectives are legitimate.

When the objectives of a racial or ethnic classification are a lawful exercise of Congress' constitutional powers to achieve national public policy, the classification is valid, provided that it withstands scrutiny under the second step in the *Fullilove* analysis, which is to determine whether the classification is a "constitutionally permissible *means* for achieving the congressional objectives". *Id.* [Emphasis in the original.] This prong of the analysis essentially evaluates the classification in equal protection terms, i.e., whether the classification "narrowly tailored" to its objectives. *Id.* at 480.

The *Fullilove* approach is similar in concept to the standard of review developed in non-remedial gender classifica-

[1] "On the other hand: when a federal rule is applicable to only a limited territory, such as the District of Columbia, or an insular possession, and *when there is not special national interest involved*, the Due Process Clause has been construed as having the same significance as the Equal Protection Clause." *Hampton v. Mow Sun Wong*, 426 U.S. at 100. [Emphasis supplied.]

tion cases. This standard requires that the classification serve legitimate and substantial governmental objectives and be substantially related to the achievement of those objectives. *Craig v. Boren*, 429 U.S. 190, 197-199 (1976). See also *Schlesinger v. Ballard*, 419 U.S. 498, 507, 510 (1975), discussing, *Frontiero v. Richardson*, 411 U.S. 677 (1973) and *Reed v. Reed*, 404 U.S. 71 (1971). In those cases, the governmental purpose for the statutory gender classifications was found to be based on nothing more substantial than common discriminatory notions, *e.g.*, that women are not as able as men to handle business matters, or inadequate legislative findings to support the "public purpose" proffered for the classification. The reach of those classifications were also, in at least some of the cases, found to be "overly broad" in that they sought to classify all women the same for reasons that applied only to a limited number of those in the class. Although these cases involved non-remedial classifications, the standard of review used by the Court is to be preferred over the "strict scrutiny" standard developed in Fourteenth Amendment remedial classification cases.

There are several important reasons that commend use of the *Fullilove* approach to review of a Fifth Amendment equal protection challenge, as opposed to use of "strict scrutiny". Most importantly, the Equal Protection Clause of the Fourteenth Amendment was intended primarily as an absolute prohibition on racial or ethnic classifications. As this Court has found, "[t]he clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States." *Loving v. Virginia*, 388 U.S. 1, 10 (1967), citing *inter alia*, *Slaughter House Cases*, 16 Wall 36, 71 (1873); *Strauder v. West Virginia*, 100 U.S. 303, 307-308 (1880); and *Ex Parte Virginia*, 100 U.S. at 344-345. See also *Regents of the University of California v. Bakke*, 438 U.S. 265, 291-295 (1978). The Due Process Clause of the Fifth Amendment, enacted much earlier in the nation's history, has no such racial or ethnic aspect to its origins or underlying intent. The "due process of law" clause of the Fifth Amendment was originally intended primarily to engraft into federal organic

law the procedural rights aspects of the "law of the land" clause in the *Magna Charta*.[4] See *Murray's Lessee v. Hoboken Land and Improvement Co.*, 59 U.S. 272, 276 (1855). This is not to argue that the Fifth Amendment is only procedural in scope. Its implied equal protection component does not, however, carry the same absolute nature, history, or intent as the Equal Protection Clause.

In addition, there are other differences that require a different standard of review. First, the two constitutional provisions are directed at different levels of governmental authority. The power of Congress, particularly in the area of remedial action to remove barriers to commerce, is more extensive than those of state or local government. *Fullilove*, 448 U.S. at 499 (Powell, J., concurring). Second, Congress as a co-equal branch of government has more discretion in determining that such barriers exist, and in choosing an appropriate remedy. *Richmond*, 109 S.Ct. at 718-719 (O'Connor, J., plurality opinion). Third, Congress occupies the highest level of representative government, where there is the maximum diffusion of the parochial interests that can lead to politics of racial hostility. Madison, *The Federalist*, No. XV 86-88 (Legal Classics Library Ed. 1983). Lastly, the *Fullilove* approach allows for an evaluation of Congress' national policy objectives to determine if the purpose of a classification "transcends the harm to the members of the disadvantaged class." *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 452-453 (1985) (Stevens, J., concurring).

Moreover, the seemingly endless debate that has accompanied the adoption of "strict scrutiny" should be avoided in Fifth Amendment equal protection cases. This debate, filled as it is with questions concerning the application of concepts such as "heightened scrutiny", "intermediate scrutiny", "compelling governmental interests", obscures the more important issues. These issues, this *amicus curiae* submits, are,

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[4] "No free man shall be seized, or imprisoned, or disseised, or outlawed, or exiled, or injured in any way . . . except by the lawful judgment of his peers, or by the law of the land." *Magna Charta*, Chapter 39, reprinted in, *Appendix Vol. 11, Guide to American Law* 245, 251 (West Publishing Co. 1985).

first, *whether the governmental authority has the power to achieve the objective of a racial or ethnic classification*, and, second, *whether the purpose is legitimate and substantial*. Once these questions are answered in the affirmative, the second prong of the *Fullilove* approach comes into play. The classification must be examined under the equal protection component of the Fifth Amendment to determine if it is rational, in other words whether the scope and extent of the classification is "narrowly tailored" to the achievement of its purposes.

II. THE OBJECTIVES OF THE STATUTE AND FCC PROCEDURES UNDER REVIEW ARE TO ACHIEVE DIVERSITY OF BROADCAST STATION OWNERSHIP WHICH FOSTERS SUBSTANTIAL NATIONAL ECONOMIC AND REMEDIAL POLICIES AS WELL AS FIRST AMENDMENT GOALS

The legislative and regulatory initiatives at issue in this case seek *to achieve substantial national public policy objectives, including economic diversity of broadcast station ownership*. It is far too late in the history of the Communications Act of 1934, as amended, 47 U.S.C. Section 101 *et seq.*, to argue that diversity as a concept does not carry with it important First Amendment goals. *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 795 (1978); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390-391 (1969). Much more, however, is involved in understanding diversity, particularly its economic and remedial aspects. The foundation of the concept is that radio and television depends for its very existence on the availability of a finite public resource, the electromagnetic spectrum. Diversity seeks to insure, to the extent possible, that this resource is not monopolized either through economic concentrations of ownership, or by reason of unfair or discriminatory barriers that exclude large

sections of the public from sharing in the economic benefits of the spectrum as a public resource, which are substantial.[5]

These economic and remedial goals are readily apparent in the Congressional intent underlying the statute being reviewed in this case. The statute was originally enacted as a part of the 1988 continuing appropriations act. *Continuing Appropriations Act for the Fiscal Year 1988*, Pub.L. No. 100-202, 101 Stat. 1329 (1988). The statute has been reenacted two times since and remains in effect today.[6] In the words of the original Senate authors of the measure, it prohibits the FCC from spending any funds to "repeal" or "restrict" its current "rules" which "promote ownership of broadcast licenses" by minorities, including the minority "preference" in comparative hearings.[7] The authors of the statute also saw this "preference" as promoting "diversity" of radio and television station "ownership" and serving "important public interest goals" such as "diversity of programming" and "improved service to minority audiences". *S. Rep.* No. 182, 100th Cong., 1st Sess. 75 (1987).

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[5] Although the spectrum used for broadcasting is made available by the federal government at no charge to the licensee, station ownership is an extraordinarily valuable economic asset, frequently sold to others for substantial prices. A network affiliated television station in Louisville, Kentucky, for example, commanded a selling price of $85.7 million in 1986. An independent television station in the Bloomington, Indiana, area sold for $73 million in 1985. Even a day-time only AM radio station in Tacoma, Washington, sold for $2.0 million in the same year. Paul Kagan Associates, Inc. *Kagan's Record of TV Station Deals, 1981-1988* (1989); Paul Kagan Associates, Inc. *Kagan's Record of Radio Station Deals, 1981-1988* (1989).

[6] *Departments of Commerce, Justice & State, the Judiciary and Related Agencies Appropriation Act of 1989*, Pub.L. No.100-459, 102 Stat. 2216 (1988); *Departments of Commerce, Justice & State, the Judiciary and Related Agencies Appropriations Act of 1990*, Pub.L. No. 101-162, 103 Stat. 1020 (1989).

[7] Those "rules" mandated by Congress to remain in effect plainly included the FCC comparative hearing procedures under review in this case. After discussing their intent to prohibit repeal of the "rules" promoting minority "ownership", the Senate Committee quoted from *Steele v. FCC*, 770 F.2d at 1196, where with reference to the procedures in comparative hearings, the Court said the FCC's "authority to adopt minority preferences. . . is clear." *S. Rep.* No. 182, 100th Cong., 1st Sess. 75 (1987).

In addition to these First Amendment goals, the Senate authors of the statute referenced Congress' findings in the 1982 legislation authorizing the FCC to use random selection as an alternate licensing method to comparative hearings. *Id.* at 76. In this legislation Congress amended Section 309 of the Communications Act to grant the FCC the statutory authority it sought.[8] Congress required, however, that "significant preferences" be granted to minorities in the random selection of broadcast licenses. *Communication Amendments Act of 1982*, Pub.L. No. 97-259, 96 Stat. 1087 (1982), amending, 47 U.S.C. 309(i)(3)(A). Congress made three crucial findings in connection with this legislation. First, minorities have been "extremely underrepresented" in media ownership.[9] Second, minority preferences in licensing could serve to "diversify" the "sources of information" on the airwaves. Third, "past inequities stemming from racial and ethnic discrimination" have resulted in the lack of minority involvement in broadcast station ownership. Fourth, minority preferences in licensing provides "one means of remedying the past economic disadvantage to minorities which has limited their entry into various sectors of the economy, including the media of mass communications . . . ." *H.R. Conf. Rep.* No. 765, 97th Cong., 1st Sess. 43-44 (1982).

The 1982 legislation and the statute under review in this case cannot be viewed as separate and distinct. The sponsors of the 1988 appropriations provision "expressly linked" their objectives with those of Congress in 1982. See *Fullilove*, 448 U.S. at 463, where the preference under review was enacted as a 1977 appropriations provision similarly "linked" in terms of Congressional intent with earlier legislation. More-

[8] Statutory authority for use of random selection was sought by the FCC primarily to minimize use of comparative hearings and thus expedite service to the public and avoid regulatory cost. *Amendment of Part 1 of the Commission's Rules to Allow the Selection from Among Mutually Exclusive Competing Applications Using Random Selection or Lotteries Instead of Comparative Hearings*, 88 F.C.C.2d 476, 477-478 (1981).

[9] The House Conference Report on the 1982 amendments notes that in 1981, only about two percent of all commercial and non-commercial broadcast stations were minority owned. *H.R. Conf. Rep.* No. 765, 97th Cong., 1st Sess. 43-44 (1982).

over, both the statute *sub judice* and the random selection amendments concern the same subject, *i.e.*, radio and television licensing, and implement the same national policy, *i.e.*, diversity of station ownership. Indeed, Congress made it clear that the "minority preference" required in the 1982 amendments applied only to broadcast or other licenses used in the provision of "information or mass media services." *H.R. Conf. Rep.* No. 765, *supra* at 41. It required no preference for random selection of non-broadcast common carrier licenses.

It is in this framework of a clear statutory mandate to the FCC, supported by express findings of intent by Congress to require use of existing minority preference procedures, that this case must be viewed. Every action taken by the FCC has been pursuant to either judicial or legislative directive. The agency has by no means undertaken these actions on its own. See *Hampton v. Mow Sun Wong*, 426 U.S. at 103-105. The diversity objectives of the racial and ethnic classification underlying the minority preference must also be viewed in a broad context. They are not limited solely to First Amendment concerns. The goals of the classification system are a combination of various national policies, particularly economic and remedial policies along with the diversity of opinion and viewpoint that is at the heart of the First Amendment.

III. THE STATUTE AND FCC PROCEDURES UNDER REVIEW ARE A LAWFUL EXERCISE BY CONGRESS OF THE COMMERCE POWER AND WITHIN THE FCC'S DELEGATED POWERS UNDER THE COMMUNICATIONS ACT OF 1934

The 1988 appropriation provision and its subsequent reenactments are a *lawful exercise of Congress' power over commerce.* They implement clearly legitimate and substantial economic and remedial goals, as well as First Amendment diversity of opinion and viewpoint objectives. These objectives are superior to the interests of those who may not benefit from the classification, primarily because those parties have

no right, claim or vested interest in the spectrum used for broadcast service, which, under the Communications Act, is a finite public resource to be distributed by the FCC pursuant to the "public interest" standard mandated by Congress.

A. THE 1988 APPROPRIATIONS PROVISION AND ITS SUBSEQUENT ENACTMENTS ARE LAWFUL EXERCISES BY CONGRESS OF THE COMMERCE POWER

The radio and television licensing system established by Congress in Title III of the Communications Act is "a proper exercise of its power over commerce." *National Broadcasting Co., Inc. v. United States*, 319 U.S. 190, 227 (1943). In this area of commerce, subject as it is to exclusive federal control, Congress' powers are plenary. Those powers encompass remedial measures to correct the effects of private discrimination. See *Heart of Atlanta Motel, Inc. v United States*, 379 U.S. 241, 257 (1964) and *Katzenbach v. McClung*, 379 U.S. 294, 304 (1964), where "this Court held that Congress had the power under the Commerce Clause to prohibit racial discrimination in public restaurants on the basis of its 'finding[s] that [such discrimination] had a direct and adverse effect on the free flow of interstate commerce.' " *Fullilove, supra* at 499 (Powell, J., concurring). It was only because private and *state* discrimination was involved in *Fullilove* that the Court needed to go beyond the Commerce Clause to find a source of federal power to impose the preference at issue there. *Fullilove*, 448 U.S. at 476, discussing the enforcement provisions of Section 5 of the Fourteenth Amendment.

The policy foundation of the 1988 appropriations statute and subsequent legislation is Congress' 1982 finding that there is a lack of minority ownership in the broadcast industry *as a whole*, which stems from "racial and ethnic discrimination". *H.R. Conf. Rep.* No. 765, *supra* at 43. It saw the effect of this discrimination as impairing minority access to the broadcast industry, "as it has adversely affected their participation in other sectors of the economy as well." *Id.* It takes no act of legerdemain to perceive that these findings are the

same as in *Katzenbach*, 379 U.S. at 304, where Congress *prohibited* discrimination, and *Fullilove*, 448 U.S. at 478, where Congress created a classification system to *remedy* discrimination. In this case, Congress has found that there are barriers to entry into the broadcast industry resulting from private discrimination and it can, under the Commerce Clause, adopt appropriate remedial measures. Given Congress' plenary power over commerce, it need not have found that the barriers to entry result from *discrimination*. The mere finding of barriers to commerce, standing alone, would have been constitutionally sufficient, especially when the distribution of a scarce public resource is involved and a substantial portion of the economy is, for whatever reason, unable to participate in its benefits.

Congress' findings as to economic conditions in the broadcast industry are entitled to "great weight." *CBS, Inc. v. Democratic National Committee*, 412 U.S. 94, 102 (1973). The Court need not search behind those findings to review the weight or sufficiency of the evidence on which Congress based its actions. *Mathews v. DeCastro*, 429 U.S. 181, 185 (1976). Congress as a legislative body is not required "to make findings of fact and conclusions of law", and it may call on its collective "experience" gained from repeated legislation "in an area of national concern." *Fullilove, supra* at 502-503 (Powell, J., concurring). Even in the Fourteenth Amendment cases, members of the Court have recognized that congressional findings on matters of national policy are unique. The "degree of specificity" required for congressional findings, and the "breath of discretion" that it has, is considerably different from that of a state or local government. *Richmond*, 109 S. Ct. at 719 (O'Connor, J., plurality opinion.)

The evidence of the private discrimination on which Congress acted is, nonetheless, manifest. The record before Congress when it made its findings as to economic discrimination in the broadcast industry included numerous congressional hearings and the FCC's own study conducted by its Minority Task Force. *Report on Minority Ownership in Broadcasting* 9, 24-25, 26 (May 17, 1978), cited as part of the record, *H.R. Conf. Rep.*, No. 765, *supra* at 44. The

Minority Task Force Report documents a pattern of private economic discrimination aimed at minorities, including: brokers refusing to disclose information on station availability to minorities; rating methods that "inaccurately" suppres the estimated audience for minority owned stations; and the prevalent "notion" that minority customers are "unimportant" or do not represent a particularly "lucrative market". The Task Force, in sum, found that minority ownership is restricted "because of a lack of capital, limited experience and racism." This is no "amorphous claim of societal discrimination", *Richmond*, 109 S. Ct. at 723-724, but the same type of barriers to entry that the Court relied on in *Fullilove*, 448 U.S. at 477-478, as ample support for Congress' findings.

B. THE FCC'S REGULATORY ACTIONS CONCERNING MINORITY STATUS IN EVALUATING LICENSE QUALIFICATIONS ARE A VALID EXERCISE OF DELEGATED POWER

The FCC procedures that consider minority status in broadcast comparative hearings have, since the enactment of the statute under review, been pursuant to its express statutory mandate. There is, thus, no question that those procedures are an exercise of delegated authority conferred on it by Congress. This is not to suggest the FCC lacked authority for its procedures prior to the enactment of the appropriations provision. Under the "public interest" standard established by Congress in the Communications Act, the FCC may consider many national policy objectives in making licensing decisions. Those objectives include diversification of the sources of opinion and point of view in the broadcast media. They can include measures designed to remove barriers to minority access to broadcasting.

The core of the FCC's grant of delegated authority is in Sections 308 and 309 of the Act, which allows the FCC to consider a licensee's "citizenship, character, financial, technical and other qualifications." 47 U.S.C. Section 308 and 309. The essential premise of these provisions is that "the physical scarcity of broadcast frequencies, as well as

problems of interference between broadcast signals, led Congress to delegate broad authority to the [FCC] to allocate broadcast licenses 'in the public interest.' " *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. at 795. Under this standard, the spectrum used for broadcasting is treated as a public resource. 47 U.S.C. Section 301. Licenses create no "property rights". They may be "revoked, and need not be renewed." The spectrum used by one licensee may be reassigned "in the interest of the listening public." *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 475 (1940). See also, *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137-138 (1940).

Under these provisions, federal economic policy may be considered in determining whether the statutory mandate of the public interest, convenience, and necessity will be served in granting a license. *National Broadcasting Co., Inc. v. United States*, 319 U.S. at 222-224. Those economic policies include antitrust objectives. *United States v. RCA*, 358 U.S. 334, 351 (1959). Other more general economic diversity policies are also included in the public interest mandate. The FCC can lawfully limit the number of licenses that may be held by an individual or entity, *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 203-204 (1956), and limit cross ownership of broadcast and other media, *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. at 795. Significantly, in neither case did the Court require the FCC to find antitrust violations, or even conduct in restraint of trade, before imposing limitations on ownership of universal application to all licensees. The objective of diversity of economic control of the spectrum *per se* was sufficient.[10]

Similarly, First Amendment goals are valid objectives under the FCC's statutory mandate. As this Court has held, promoting diversity of station ownership to achieve a broader range of viewpoint and opinion is within the FCC's power, along with directly promoting diversity of opinion on the airwaves. *Red Lion Broadcasting v. FCC*, 395 U.S. at 390.

[10] The FCC's Rules also contain extensive regulations limiting multiple ownership of broadcast or other media holdings, including newspapers or other newsprint media. See 47 C.F.R. 73.3555

This does not suggest that the FCC is, under its public interest mandate, a guardian of the public economic welfare, or an arbiter of broadcast programming. As this Court held in *NAACP v. FPC*, 425 U.S. 662, 669 (1975), "in order to give content and meaning to the words 'public interest' . . . it is necessary to look at the purpose" for which the Act was adopted. The legislative intent of Congress, though, in this case is manifest. The intent of Congress that the FCC use its licensing power to prohibit *economic concentrations* of control over broadcasting is fully recognized in *National Broadcasting Co., Inc. v. United States*, 319 U.S. at 221 n. 5, as it is with respect to *ideological diversity* in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 379 n. 7 (1968).

The FCC is likewise authorized to redress economic or other forms of barriers to entry into broadcasting under the Communications Act, provided that the exercise of that power is pursuant to a public interest objective in broadcasting. In *NAACP v. FPC*, 425 U.S. at 670 n.7, this Court observed that, unlike the FPC, the public interest mandate of the FCC brings with it broad goals of diversity that can include race conscious remedial measures. It commented that the FCC's regulations promoting increased minority employment in broadcasting "could be justified as necessary to enable [it] to satisfy its obligations" under the Act. These regulations established minority employment goals, required affirmative action programs and imposed minority employment reporting requirements on licensees. The Court saw these measures as fulfilling public interest obligations to "ensure that its licensees programming fairly reflects the tastes and viewpoints of minority groups."

This is not to suggest that the FCC has the power to enforce antitrust or civil rights laws *per se*, or that it can regulate programming, except to the extent of unprotected speech. *Red Lion Broadcasting v. FCC*, 395 U.S. at 389-390 and 47 U.S.C. Section 326. Its licensing power over the spectrum as a public resource does, however, give it the means to implement the diversity policies established by Congress. This power is to be exercised not for the benefit of broadcasters, but for the public, to insure that the economic

and free expression benefits of the public resource are distributed as widely as possible.

IV. THE STATUTE AND FCC PROCEDURES UNDER REVIEW ARE NARROWLY TAILORED TO THEIR OBJECTIVE AND DO NOT IMPOSE AN OVERLY BROAD OR IRRATIONAL CLASSIFICATION

The second prong of the *Fullilove* Fifth Amendment equal protection analysis requires examination of a racial or ethnic classification to determine if it is "narrowly tailored" to its objective. This aspect of the analysis was only partially explored in the decision because the case involved a "facial" challenge to the federal statute. As the Court explained, the statute was challenged "on its face" without any attempt to show that it resulted in constitutional or statutory violations "as applied in identified situations". *Fullilove*, 448 U.S. at 480-481. The Court, nonetheless, rejected the argument that the classification was "overinclusive". It found that administrative procedure in the program, which allowed a waiver of the preference on a showing that competing minority contractors had not suffered past discrimination, was sufficient, at least on its face, to insure that the program was limited to its remedial purposes. *Fullilove*, 448 U.S. at 486-489.

The FCC procedures at issue *sub judice* are "narrowly tailored" to their objective not only on their face but also as applied. Although the "narrowly tailored" requirement has never been defined in any one decision, its elements appear to include an examination of four criteria: first, the structure of the classification; second, its scope and duration; third, its effect on those excluded; and, fourth, the availability of less intrusive remedies. The FCC procedures here meet each of these elements.

Most importantly, *the structure of the FCC's procedures does not impose a quota or seek merely to balance racial numbers.* There is no fixed number of licenses to be awarded to minorities. Minority status is given weight only when it

is combined with other factors—principally integration into management and local residence—that serve the ultimate public purpose goal of the classification. Moreover, minority status does not automatically prevail even when combined with total integration and local residence. As the FCC emphasized in its *Statement of Policy on Comparative Broadcast Hearings, supra* at 393, 399, other factors can be considered in the hearing process and the guidelines established in the *Policy Statement* are "not intended to preclude the full examination of any relevant and substantial factor." In short, minority status is not outcome determinative in the comparative hearing process. To the contrary, the the comparative hearing procedures are "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight." *Regents of the University of California v. Bakke*, 438 U.S. at 317 (1978). Under such circumstances, the procedures cannot be considered as harmful to minorities, or as tending to stereotype them. Minority status is a "plus" factor, but they are not insulated from competition, or from comparison.

Second, *the FCC procedures are not overinclusive, nor are these procedures without limit as to their duration and effect.* The procedures aim at increased minority participation in broadcast ownership so as to expand economic opportunity and the sources of opinion and viewpoint on the airwaves. These procedures, however, are applied in a comparative hearing process that is neither inflexible or automatic in its application. The current dearth of minority ownership is so severe that an integrated minority applicant with local residence may seem to prevail in most cases. This is, however, not required under these procedures, nor likely to continue indefinitely. Upon a proper showing that there is already ample minority broadcast ownership in the community, the FCC can, under existing procedures, award the license to a competing non-minority applicant. Even in the case of the primary comparative factor, diversity of broadcast ownership, an applicant with less media holdings than a competing

applicant does not necessarily receive substantial comparative merit if, in the community to be served, there is already ample enough diversity of media interests that strict application of the diversity factor is not required. See *WPIX, Inc.*, 68 F.C.C.2d, at 409 (1978).

Third, *the comparative consideration given to minority applicants does not overly burden other applicants.* The comparative hearing procedures do not involve a contest between a minority applicant and an *existing* licensee. They are applied in the context of a contest between two or more applicants which are vying for the same license, and which, ideally, have no other attributable broadcast interests. When and if the minority applicant prevails, the non-minority applicant has lost an expectancy but not a vested interest. Thus, the situation is analogous to the balancing of interests in employment affirmative action cases where the Court has recognized that the goals of improving employment of minorities transcend the harm to non-minorities when they potentially lose the expectancy of employment, as opposed to loss of actual employment. Compare *Steelworkers v. Weber*, 443 U.S. 193, 208 (1979) with *Wygant v. Jackson Board of Education*, 476 U.S. 267, 281-283 (1986).

Lastly, the FCC has also *tried less intrusive remedies and found them to have failed to significantly increase minority broadcast ownership.* Prior to its *Policy Statement on Minority Ownership of Broadcasting Facilities, supra* at 981, the FCC implemented a host of "race-neutral" programs. These measures included the basic comparative factors themselves which, prior to specific consideration of minority status, sought generally to promote wider diffusion of broadcast station ownership. The FCC also implemented measures to require ascertainment of minority and other community programming needs. *Ascertainment of Community Problems by Broadcast Applicants*, 57 F.C.C.2d 418 (1976). In addition, it required fair employment practices and reporting. *NAACP v. FCC*, 425 U.S. at n.7. In its *Policy Statement*, though, it found that those remedies had proven inadequate and ineffective. On the other hand, the inclusion of minority status as a "substantial integration enhancement", along with

the parallel policy decision to allow structured broadcast applications, has proven effective. The comparative factor has induced substantial minority participation and success in the comparative hearing process,[11] while the structured application policy has overcome the financing problems that have heretofore plagued minorities interested in the economic opportunities afforded by broadcasting.

CONCLUSION

The classification imposed by Congress under the 1988 appropriations provision and renewed each year since is a lawful exercise of its power under the Commerce Clause. Congress has found that there are discriminatory barriers to entry into the broadcast industry. It may properly impose a closely drawn racial classification designed to remove those barriers. The classification involved fully complies with the equal protection component of the Fifth Amendment and, as such, is constitutional. The judgement below accordingly should be affirmed.

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[11] See Petitioner's Brief on the merits at p. 23, n. 59.